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Supreme Court of the United States

OCTOBER TERM, 1940.

No. ~~1012~~ 67

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HARRY DOW,
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Counsel for Petitioner.

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OCTOBER TERM, 1940.

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SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Southport Petroleum Company, a corporation, heretofore organized and operating under the laws of the State of Texas, respectfully prays this court, by certiorari, to review and determine cause No. 9517, styled *National Labor Relations Board, Petitioner, vs. Southport Petroleum Company, Respondent,* wherein the Circuit Court of Appeals for the Fifth Circuit at New Orleans has rendered final judgment sustaining and enforcing an order of the National Labor Relations Board requiring

this respondent to take certain affirmative action such as reinstating employees and posting notices, and has overruled a motion of this respondent to adduce additional evidence to the effect that this respondent discontinued operations on June 30, 1939, and was therefore not capable of complying with that part of the court's order requiring such affirmative action as reinstatement of employees and posting of notices.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 4, 1938, the National Labor Relations Board rendered its order upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, and ordered this respondent to cease and desist from:

(a) Discouraging membership in Oil Workers' International Union Local No. 227;

(b) In any other manner interfering with, restraining, etc., its employees in the exercise of the rights * * * guaranteed in Section 7 of the Act, and to take the following affirmative action:

(a) Offer certain three named employees immediate and full reinstatement to their former positions, etc.:

(b) Make whole each of said employees for lost pay suffered by reason of their discharge;

(c) Post appropriate notices; and

(d) Notify the regional director, within ten days of the date of the order, of the steps taken to comply with the order.

On April 30, 1940, over one year and eight months after date of its order, the board filed in the Circuit Court of Appeals for the Fifth Circuit a petition for the

enforcement of its order of August 4, 1938, and a transcript of the entire record in the proceedings designated as "*In the Matter of Southport Petroleum Company and Oil Workers' International Union, Local No. 227*, No. C-477, and R-600 National Labor Relations Board.

This petitioner (respondent in the circuit court of appeals, and herein also referred to as respondent) thereupon filed a motion (pages 97-100 Transcript of Record) in said court for leave to adduce additional evidence to the effect that subsequent to the entry of the order of the board, its stockholders declared a liquidating dividend, June 30, 1939, said dividend consisting of all of the assets of the corporation, and said corporation discontinued operating its refineries and ceased doing business and was, therefore, not in a position to reinstate employees or post notices. This motion was filed in pursuance to the provisions of Section 10 (e) of the National Labor Relations Act, 49 Stat. 453; 29-30 U. S. C. A., Pocket Parts, 1940, page 98. This petitioner further filed an answer in the circuit court of appeals urging the granting of said motion, and further alleged that it was formally dissolved on October 18, 1940, and attached to such answer was a certificate of dissolution issued by the secretary of the State of Texas (pages 107-114 Transcript of Record).

On January 4, 1941, the circuit court of appeals rendered its opinion overruling the motion and holding that the board's order should be enforced. This petitioner filed its petition for rehearing on January 23, 1941, within 21 days after entry of judgment or in accordance with the requirement of Rule 29 of said circuit court of appeals, which motion was overruled by said Honorable Court on February 1, 1941 (page 127 Transcript of Record). On February 26, 1941, said circuit court of appeals entered its decree (pages 128-130 Transcript of Record) requiring this petitioner to comply with the order of the board, notwithstanding the verified motion that petitioner had discontinued activities on June 30, 1939.

II.

OPINION BELOW.

The opinion of the Honorable United States Circuit Court of Appeals for the Fifth Circuit is reported in Volume 117, Federal Reporter, Second Series, pages 90, 91 and 92, and styled *National Labor Relations Board* v. *Southport Petroleum Company*.

III.

JURISDICTIONAL STATEMENT.

1. The statutory provisions relied upon to sustain jurisdiction is Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347.

2. The opinion of the circuit court of appeals was rendered on January 4, 1941. The petition for rehearing in said court was filed on January 23, 1941, or within the 21 days period allowed for the filing of such petition by Rule 29 of the Rules of the United States Circuit Court of Appeals for the Fifth Circuit. Rehearing was denied by said court on February 1, 1941, and the judgment or decree of the circuit court of appeals is dated February 26, 1941. This petition for writ of certiorari is filed within three months of the date of the overruling of the petition for rehearing and within three months of the date of the final judgment or decree of said circuit court of appeals. 28 U. S. C. A. 350.

IV.

QUESTIONS PRESENTED.

1. Should the motion of the petitioner to refer the case to the National Labor Relations Board for leave to adduce additional evidence duly supported by affidavit of

the petitioner to the effect that petitioner discontinued operating its refineries on June 30, 1939, by declaring a liquidating dividend of all of its assets and was therefore not in a position to comply with such mandatory order as reinstatement of employees and posting notices, have been granted by the Honorable Circuit Court of Appeals?

2. Do the provisions of Section 10 (e) of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. A., 1940 Cumulative Annual, Pocket Part 160, page 98 entitle a respondent, who files a verified motion to the effect that such respondent has discontinued operations and is dissolved and is willing to make proof thereof, to have the case referred back to the board for this purpose of completing the record where such dissolution took place after the hearing before the trial examiner and after the board issued its order thereon?

3. Should the circuit court of appeals have required petitioner who is not engaged in any active business to reinstate three discharged employees and post notices or should it have granted petitioner's motion and referred the case back to the board for findings as to when the corporation discontinued operations and whether the new corporation operating the refinery was a successor or assignee of the petitioner in order to have all of the facts upon which to render a decree that could be complied with or enforced?

4. Should an order of the National Labor Relations Board rendered August 4, 1938, be enforced by the circuit court of appeals on petition filed April 30, 1940, or over one year and eight months after the date of the order where petitioner in the interim had discontinued operating its business and filed a motion for leave to make proof of such cessation of activities on June 30, 1939?

5. Did the Honorable Circuit Court of Appeals properly require the petitioner to "make whole" any loss of

three discharged employees without limiting the time to June 30, 1939, the date petitioner discontinued to operate its refinery, as shown by verified motion setting up such fact and praying for an opportunity to make proof thereof before a representative of the National Labor Relations Board?

6. Should an employer be required to reinstate three discharged employees where the record reflects that although such employees were active in the union, one admitted that he continuously indulged in intoxicants after being warned to cease such habits; and a second admitted he took off certain days and came to work an hour and a half late without permission of his employer; and a third admitted that he was replaced by a senior employee?

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Honorable Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Honorable Court. The Honorable Circuit Court of Appeals decided that even though a respondent in a labor case has dissolved and discontinued operations after the board made its order, it will nevertheless enforce such mandatory orders requiring such respondent to reinstate discharged employees and post notices, thus requiring such respondent to resume operations or expose such respondent to contempt proceedings.

2. The decree of the Honorable Circuit Court of Appeals in denying respondent's motion to adduce additional evidence and thus complete and correct the record is in conflict with the opinion of this Honorable Court in the

case of *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, where such right was afforded the National Labor Relations Board.

3. The Honorable Circuit Court of Appeals for the Fifth Circuit has rendered its decision requiring the payment of back wages to discharged employees where such discharged employees cannot be reinstated (by reason of the fact that the petitioner is not engaged in any activity) which is contrary to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Carlisle Lumber Company*, (1938) 99 F. 2d 533, writ of certiorari denied in 1939, 306 U. S. 646, 59 S. Ct. 586, wherein the court held that the law does not permit an award for back pay without reinstatement because the back pay provision is connected with and dependent upon the reinstatement provision.

4. The Honorable Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decision, in that the Honorable Circuit Court of Appeals apparently decided that the provisions of Article 1388 of the 1939 Vernon Texas Annotated Civil Statutes* requires such corporation to resume operation and to reinstate discharged employees and post certain notices required by the board.

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*Article 1388: "Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority, of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

VI.

SUPPORTING BRIEF AND ARGUMENT.

In order for the Honorable Circuit Court of Appeals to have entered an enforcible decree, the transcript should have contained the findings of the board on the matters set out in the petitioner's motion to adduce additional evidence. The petitioner contended that it discontinued all operations on June 30, 1939, by a declaration of a liquidating dividend whereby the property of the corporation was divided among its four stockholders, two stockholders accepting the refinery at Texas City, Texas, and the other two stockholders accepting the refinery at Kilgore, Texas. The refinery at Texas City, where the labor trouble existed was sold by the stockholders receiving same as a liquidating dividend to a Delaware corporation. In its verified motion the petitioner set up that none of its stockholders had any interest in the Delaware corporation and that the owners of stock in the Delaware corporation at no time ever owned any stock of the petitioner, which was the Texas corporation. Petitioner was prepared to prove that its dissolution was in good faith, that it discontinued all operations of its plant on June 30, 1939, and that any award of back pay should have been limited to that date.

Had the motion been granted, the board would have likewise had an opportunity to attempt to prove that the Delaware corporation was a successor or assignee of the petitioner and the petitioner was prepared to meet such charge in the proper forum. The Honorable Circuit Court of Appeals in its opinion overruled the motion by reason of Article 1388 of the Revised Civil Statutes of Texas which provides that a corporation upon dissolution continues to exist for a period of three years for the purpose of suing and being sued. The Honorable Circuit Court states:

> "Conceding that the dissolution has taken place, it can have no effect upon this proceeding."

This petitioner submits that if the dissolution took place, then the order of the court requiring discharged employees to be "made whole" should have been limited to the date of such dissolution, June 30, 1939, and that the order should be modified not requiring the petitioner to reinstate discharged employees and post notices. The order of the board and the decision of the Honorable Court sustaining the order required the petitioner herein (respondent below) to resume operations. This is not the intention of Article 1388.

Petitioner recognizes that under Article 1388 it can be sued for a debt or it can sue for a debt but there are no interpretations of said article to require a dissolved corporation to resume operations in order to post notices and reinstate discharged employees.

The board in urging that the motion to adduce additional evidence should be overruled relied on this Honorable Court's decision in the case of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261-272, 82 L. Ed. 831, and related cases. Casual examination of the facts in such cases will reflect that the respondent obeyed the order of the board and filed motions to make proof that they obeyed such order and to dismiss the proceedings by reason of their compliance with the order. This court properly stated:

> "But an order of the character made by the board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

However, in the case at bar petitioner wishes to make proof that its dissolution took place after the hearing before the examiner and after the order of the board and therefore could not have been presented at such hearing and that any liability should be limited to "making whole"

discharged employees to a certain date and that mandatory requirements such as reinstatement and posting notices should not be made of a dissolved corporation which has discontinued all activities.

In the case of *N. L. R. B.* v. *Timken Silent Automatic Company*, 114 F. 2d 449 (2 C. C. A.), the court pointed out as follows:

> "* * * It may be that although the board's jurisdiction is not wholly lost (by reason of the dissolution of the corporation) that the scope of its order may be somewhat curtailed in view of the fact that even under the Michigan statute (practically same as the Texas law) the corporation ceases to exist for the purpose of continuing the business for which it was organized. An order which required for its compliance the continuation of such respondent's business as, for instance, the re-employment of unlawfully discharged employees, might well be beyond the power of the board * * *"

In construing Section 10 (e)* of the National Labor Relations Act, this Honorable Court held in the case of *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

The effect of the Honorable Court's order is to require respondent to resume operations which would necessitate the purchase of a refinery, crude oil, the re-employment of men, etc., and a dissolved corporation under Atricle 1388 is not authorized to do this.

Sec. 10 (e) " * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board * * * the court may order such additional evidence to be taken before the board * * * and to be made a part of the transcript * * *."

Should respondent fail to reinstate the employees, or post the notices—neither of which it can do—or to make whole the employees ordered reinstated, and the respondent questions the authority of the board to require back pay—certainly since the date of its dissolution—the further effect of said Honorable Court's decision would be to place the respondent in the unenviable position of being subject to contempt proceedings. Contempt action would attach to the former officials and stockholders of the respondent a stigma which the facts do not justify, and would further make difficult a proper presentation of those facts to the Honorable Court. It would be inconvenient for the Honorable Court itself to take testimony on the issue and the submission thereof on allegations by affidavit, including allegations based on information and belief, would, respondent fears, fail to give said Honorable Court an adequate appraisal of the situation which has arisen. See *N. L. R. B.* v. *Bell Oil and Gas Co.*, 98 F. 2d 405 (C. C. A. 5).

The long delay of the board in filing its opinion to enforce its order had the effect of making unenforcible the provisions of said order. *N. L. R. B.* v. *La Salle Hat Company*, 105 F. 2d 709 (C. C. A. 3).

The Ninth Circuit Court of appeals in the case of *N. L. R. B.* v. *Carlisle Lumber Company*, 99 F. 2d p. 533, held that:

> "* * * while the Act permits the board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement."

This is apparently in conflict with the holding of the Honorable Circuit Court of Appeals in the case at bar and is also in conflict with the holding of the Fourth Circuit Court of Appeals, in the case of *Mooresville Cotton Mills* v. *N. L. R. B.*, (1938) 94 ~~95~~ F. 2d 61, (CCA 4) modified on rehearing 1938, 97 F. 2d 959, where it was said that back pay might be awarded without reinstatement because "it would not offend the terms of the act, would do justice

to the worker and tend to effectuate the policies of the act."

To require the petitioner to "make whole" certain employees which it can not reinstate would be in the nature of a punishment and "the powers granted the board under Section 10 (c) are only remedial, they are designed to enable it to restore the *status quo* as nearly as possible had the wrong not been committed; further it may not go." *N. L. R. B.* v. *Remington Rand, Inc., et al.*, 94 F. 2d 862 (C. C. A. 2), certiorari denied 304 U. S. 576, rehearing denied 304 U. S. 590.

In connection with the discharge of the employees, the respondent below took the position that in operating an oil refinery sobriety on the part of its employees is absolutely essential for the safety of his fellow employees and respondent's property, and therefore it was justified in discharging a certain employee, Richey, who admitted that he had continuously indulged in intoxicants although warned by his employer to discontinue such habits (see respondent's Appendix pages 9 and 10). There was conflicting evidence as to whether such employee was drunk on a certain day when he appeared for work but there was no conflicting evidence that he continuously indulged in intoxicants and had been warned to discontinue and therefore the respondent was justified in the exercising of its normal right of hiring and discharging employees to discharge such employee, notwithstanding such conflicting evidence as to the intoxication of such employee on a certain date. The respondent was likewise justified in discharging its other two employees, Cornish having admitted that he took off certain days and came to work late another day without permission from his employer (see respondent's Appendix pages 2, 3, 6 and 7) and Gooch having admitted that a senior and more experienced employee was placed in his position (see respondent's Appendix pages 13, 21, 22, 34 and 35). Respondent would have been justified in discharging them had there been

no effort to organize its employees. *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F. 2d 13 (C. C. A. 6); *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44; *N. L. R. B.* v. *Union Pacific Stages*, 99 F. 2d 153 (C. C. A. 9); *Agwelines, Inc.*, v. *N. L. R. B.*, 87 F. 2d 146 (C. C. A. 5).

Prayer.

This petitioner respectfully submits that the Honorable Circuit Court of Appeals should have granted the motion to adduce additional evidence so that all the facts could appear in the transcript and form the basis for the rendition of an enforcible order, and this petitioner prays that certiorari be granted and, upon submission, for reversal with proper orders.

Respectfully submitted,

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